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9 Attorneys for WAYMO LLC

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 WAYMO LLC,

14 Plaintiff,

15 vs.

16 UBER TECHNOLOGIES, INC.;  
17 OTTOMOTTO LLC; OTTO TRUCKING  
LLC,

18 Defendants.

CASE NO. 3:17-cv-00939

**PLAINTIFF WAYMO LLC'S PRECIS  
FOR LEAVE TO FILE A MOTION TO  
SUPPLEMENT ITS TRIAL WITNESS  
LIST**

Trial Date: December 4, 2017

1 With its damages expert Michael Wagner excluded, Waymo will have to spend a  
2 significant amount of trial time authenticating and laying foundation for documents that the jury  
3 can use to evaluate the extent to which Defendants have been unjustly enriched from their  
4 misappropriation of Waymo's trade secrets or, alternatively, to evaluate the Georgia-Pacific  
5 factors to determine reasonable royalty damages resulting from Defendants' misappropriation. If  
6 Mr. Wagner had not been excluded, Waymo would otherwise have introduced this evidence  
7 through Mr. Wagner under Fed. R. Evid. 703. Given the Court's order excluding Wagner and  
8 these changed circumstances, Waymo respectfully seeks leave to add three additional witnesses to  
9 its trial exhibit list: Shawn Banazedeh, Prabir Adarkar, and an Uber Custodian of Records.  
10 Waymo also seeks leave to depose Uber's Custodian of Records for a half day in advance of trial.

11 **I. BACKGROUND**

12 **A. Waymo is Entitled To Present a Damages Case to the Jury**

13 On November 2, the Court granted Uber's motion to exclude Wagner's testimony. (Dkt.  
14 2166.) In its Order, the Court confirmed that Waymo can still present a damages theory through  
15 fact witnesses. (*Id.* at 9) ("Insofar as the Qi slide and other evidence in this case may turn out to  
16 be good barometers of Uber's expectations going into the Ottomotto acquisition, that evidence can  
17 stand on its own for the jury's consideration."); *id.* at 10 ("Again, the documents cited by Wagner  
18 can independently come into evidence and counsel can make the argument as well as Wagner").  
19 At the November 14 hearing, Waymo's counsel responded to arguments from Uber by arguing to  
20 the Court: "you were very clear in your order that we would still get to put on a damages case  
21 based upon documents and witness testimony. And we intend to do that." (Dkt. 2222, 11/14/17  
22 Hearing Tr., 86:15-17.) Consistent with the Court's prior acknowledgement that damages experts  
23 are not required for damages questions to be put to the jury, the Court did not disagree with  
24 Waymo's understanding of its Order.

25 **B. Waymo Served its Initial Witness List Before the Court's Order Excluding**  
26 **Wagner**

27 Waymo served its initial trial witness list on September 16, before the Court issued its  
28 Order excluding the testimony of Michael Wagner. (Dkt. 2166.) After the Court issued its order

1 excluding Wagner on November 2, Waymo sought to add Shawn Banazadeh and Prabir Adarkar  
2 to its trial witness list on November 15, and informed Uber on November 22 that it will seek leave  
3 to add an Uber Custodian of Records witness as well. As Waymo has explained to Uber, Waymo  
4 is seeking leave to add these witnesses to support certain aspects of its damages case that Waymo  
5 otherwise would have introduced through Wagner pursuant to Fed. R. Evid. 703.

6 Waymo did seek leave to add Mr. Banazadeh to its trial witness list before the Court issued  
7 its Order on Wagner, informing Uber on October 23 that it may call Mr. Banazadeh to provide  
8 “non-cumulative testimony regarding costs of development of, and management of Waymo’s self-  
9 driving cars and autonomous vehicle technology” should the need arise. (Dkt. 2062-9.) Although  
10 the Court ruled on October 26 that Waymo may only rely on Mr. Banazadeh as a rebuttal witness  
11 if Uber relies on his testimony first, that ruling was before the Court issued its order excluding  
12 Wagner and Waymo respectfully requests reconsideration of that order now.

## 13 **II. ARGUMENT**

14 The Court should grant Waymo’s motion because Waymo has shown good cause. The fact  
15 that Waymo may need to introduce testimony and evidence through fact witnesses is the logical  
16 result of the Court’s Order excluding Wagner. And Waymo’s request is a modest one: Waymo is  
17 only seeking to add three witnesses, all of whom are known to Uber. It would be unfair for the  
18 Court to exclude Wagner, prohibit Wagner from amending his report, and then *also* deny  
19 Waymo’s reasonable request to add three fact witnesses that it needs to support its damages case.

20 There is also no prejudice to Uber. Of the three witnesses Waymo seeks to add, only one  
21 is a Waymo witness; the other two are Uber witnesses. Mr. Banazadeh, the lone Waymo witness,  
22 is well-known to Uber: Mr. Banazadeh was Waymo’s 30(b)(6) witness on Waymo’s cost to  
23 develop the asserted trade secrets, and Uber spent a full day deposing him in both his 30(b)(6) and  
24 personal capacity during fact discovery. Mr. Adarkar is Head of Strategic Finance at Uber, and  
25 Uber’s acting CFO. He is an Uber witness and therefore Uber has access to him and his  
26 knowledge throughout the case. Waymo also deposed Mr. Adarkar during fact discovery,  
27 meaning that Uber has been on notice that his testimony is relevant since Waymo requested his  
28 deposition in August. Finally, Mr. Wagner cited to and relied on Mr. Adarkar’s deposition

1 testimony in his opening report, so Uber has also been aware that Waymo would rely on Mr.  
2 Adarkar's testimony to support its damages case since at least August 24.

3 Waymo also seeks leave to add an Uber Custodian of Records to its trial witness list, and  
4 to depose Uber's Custodian of Records for a half day in advance of trial. As Waymo has  
5 explained to Uber, Waymo seeks leave to add this witness so it can efficiently authenticate and lay  
6 a foundation for documents that the jury can use to evaluate damages resulting from Defendants'  
7 misappropriation. This is an accepted and allowable approach. *Mc Asset Recovery, LLC v. Castex*  
8 *Energy, Inc.*, No. 4:07-CV-076-Y, 2013 WL 12171724, at \*2 (N.D. Tex. Jan. 7, 2013) (granting a  
9 trial subpoena to a records custodian since "one of the primary purposes behind the subpoena is to  
10 procure a records custodian to authenticate certain documents for introduction at trial.");  
11 *Commodity Futures Trading Comm'n v. Amerman*, No. 1:07-CV-2280-HTW, 2011 WL 13121207,  
12 at \*1 (N.D. Ga. Oct. 7, 2011) ("[T]he Court hereby orders Defendant Amerman to identify and  
13 authenticate the corporate records of DVG he has already produced, as a custodian of DVG, to the  
14 Plaintiff in this case."). Waymo has already provided a preliminary list of the Uber-produced  
15 documents that it would ask Uber's Custodian of Records to authenticate.

16 **III. CONCLUSION**

17 For the foregoing reasons, the Court should allow Waymo to file a motion for leave to add  
18 three additional witnesses to its trial exhibit list, and a motion to depose Uber's Custodian of  
19 Records for a half day in advance of trial.

20  
21 DATED: November 26, 2017

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22  
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